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Irish Court of Appeal Overturns Decision Relating to Statute of Limitations in Construction Dispute

by **Shane Neville**

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The Irish Court of Appeal recently considered at what juncture time began to run for the purposes of the Statute of Limitations in a situation of defectively installed foundations, which later caused cracks and damage to the external walls of houses.

In its examination of this issue, the Court of Appeal overturned the decision of the High Court in Brandley and WJB Developments Limited v Hubert Deane T/A Hubert Deane & Associates and John Lohan T/A John Lohan Ground Works Contractors (High Court 2010/10994P and Appeal 2015/245).

Background

Mr Brandley and WJB Developments Limited, the developers and plaintiffs, initiated proceedings against the defendants on 30 November 2014, claiming damages for breach of contract and negligence arising from the construction of two houses in County Galway. The first-named defendant, Mr Deane, was the supervising consulting engineer, who certified compliance with planning permission and building standards. The second-named defendant, Mr Lohan, was the groundworks contractor, whose work included the foundations of the houses. The developers (who continued to own the houses) argued that the large irreparable cracks, which had appeared in the external walls of the houses and which had rendered the houses unsafe, were a result of defective foundations and the negligence of the defendants.

The defendants pleaded that the developers' claim was "statute-barred" under the Statute of Limitations 1957, meaning that the time limit of six years for the developers to initiate proceedings had already passed by the time proceedings began. The crucial dates identified by the parties and the court are listed below.

Date	Event
March 2004	Foundations were completed
September 2004	First-named defendant engineer issued a certificate of compliance with planning permission and building regulations
January / February 2005	Houses were completed
December 2005	First-named plaintiff/developer observed cracks in the houses
30 November 2010	Plaintiffs/developers issued proceedings

The case to be decided in the High Court was whether or not the developers' claim was "statute-barred" as a claim in negligence. In other words, did all of the necessary elements of negligence first exist in March 2004 as argued by the defendants or in December 2005 as argued by the developers?

The developers (as plaintiffs) argued that "damage", an essential element of the tort of negligence, did not occur until December 2005.

The defendants argued that the six-year statutory period of limitation began to run in March 2004, when the foundations were installed. The defendants contended that the foundations were so fundamentally defective that the developers had a full cause of action in negligence/tort in March 2004. The defendants also argued that, to hold that the cause of action only accrued in December 2005, would effectively introduce a "discoverability" test, similar to that used in cases involving negligent acts causing personal injury.

High Court

On 16 April 2015, the then President of the High Court, Mr Justice Kearns, held that the developers' claim was "statute-barred" on the basis that the relevant Irish decisions in this area – including the judgment of Mr Justice Barr in Murphy v McInerney Construction Limited [2008] IEHC 323 – "firmly exclude a discoverability test as being the relevant starting date". The learned High Court judge concluded that the developers' case became "statute-barred" six years after the foundations were installed. The developers' claim was dismissed.

Court of Appeal

The developers appealed the High Court decision, basing their appeal on cases such as the UK Court of Appeal decision in Pilkington UK Limited v CGU Insurance plc [2004] EWCA Civ 23. The appeal was heard by the Irish Court of Appeal on 5 February 2016.

In a unanimous decision (Ryan, Irvine and Hogan JJ) on 2 February 2016, the President of the Court of Appeal, Mr Justice Ryan, overturned the High Court's decision and held that the developers' proceedings were issued on time and were not "statute-barred":

> … The parties are not in dispute about some fundamental points. It is agreed that the test is not based on discoverability; that is appropriate to personal injury actions by reason of the amendment of the Statute of Limitations, but it does not arise in regard to property damage of this kind
>
> … It seems to me that the learned President [of the High Court] was in error in this case. It is clear that negligence by itself without the accompaniment of damage or loss is not actionable. The plaintiffs did not suffer damage at the time when the defective foundations were installed. When the defective foundation was put in, the only complaint that the plaintiffs could have had was that the foundation was defective. They had not suffered any damage at that point – here was merely a defective foundation – but that is not damage of a kind that is actionable in tort. Indeed, it seems to me to be very questionable whether there was an action in breach of contract at that time, but I do not have to consider that on this appeal
>
> … The evidence here is that the foundation of these houses was defective, but it did not cause

> damage at that time. It caused damage in December 2005. The evidence is not that there was hidden damage which became discoverable at a later point; it is that the damage resulting from the defective foundations happened in December 2005.
>
> It seems to me to be clear that no damage resulted to the plaintiffs in March 2004 when the foundations were installed. I do not agree that the plaintiffs had any right of action at that point…
>
> … it seems to me that the situation here is clear and that the defendants have pitched the beginning of the period of limitation at too early a point that does not take account of the requirement that damage be actually suffered by the plaintiff in order to complete the cause of action…

Conclusions

Although specific to its facts, the Court of Appeal's decision affirms a number of general principles:

1. A cause of action in damages, for a non-personal-injury claim, accrues only at the time that "damage" occurs.
2. In a construction context, there may be a distinction between defective work, such as the installation of defective foundations, and actual damage, which is when the defective foundations cause damage to the building.
3. A "discoverability" test does not apply in respect of non-personal-injury claims in tort/negligence.
4. Causes of action in contract and in tort/negligence may accrue at different points in time.

This case reminds us that non-personal-injury claims for negligence against those involved in the construction industry, including engineers and architects, may in certain circumstances be initiated and successfully prosecuted more than six years after the defective work was carried out. This may have particular implications for the professional indemnity insurers of construction-related professionals.

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